Editor's note: Reconsideration granted; reversed -- 111 IBLA 360 (Nov. 3, 1989); second decision affirmed -- 114 IBLA 373 (May 24, 1990)

JUNE I. DEGNAN

IBLA 86-1396 Decided April 26, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-54599.

Set aside and referred for hearing.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Generally

> Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

APPEARANCES: Kimberly Hueter, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

June I. Degnan has appealed from a decision dated May 22, 1986, issued by the Alaska State Office, Bureau of Land Management (BLM), which rejected her Native allotment application, AA-54599. The decision states that on August 27, 1984, the Bureau of Indian Affairs (BIA) filed the Native allotment application, AA-54599, together with evidence of use and occupancy on behalf of June Degnan. BLM's decision states that the application, which was before the Department on December 29, 1983, claims use and occupancy since June 1947 for approximately 160 acres of unsurveyed and surveyed land, located as follows: "Sec. 31, T. 18 S., R. 10 W., Kateel River Meridian, containing approximately 120 acres, and approximately 40 acres of Lot 2, U.S. Survey No. 5267, Alaska."

The BLM decision further states as follows:

> Due to the repeal of the Native Allotment Act by Section 19 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.

> 1618, Native allotment applications must have been filed with an agency of the Department of the Interior prior to December 18, 1971. Applications received after that date are considered to be untimely filed and must be rejected.
>
> The reconstruction of applications filed in time, where neither the original nor a copy is presently available, is legally authorized. However, there must be sufficient objective, documentary proof which must include a Federal agency document showing timely receipt; allegations of timely filing without such proof are insufficient.
>
> Since there is not sufficient documentation to support the applicant's claim that an application was before the department prior to December 8, 1971, Native allotment application AA-54599 must be and is hereby rejected. The case file will be closed when this decision becomes final.

Degnan, in her statement of reasons for appeal, states that she originally applied for a Native allotment in the late 1960's, as urged by her father, who assisted her in staking the land and filling out an application. She advised that the land staked and applied for was land she had used for berry picking and that the stakes still mark the land she chose. Degnan asserts that the land is recognized by other members of the community as her allotment.

After filling out and signing the application, Degnan gave the form to her father to mail to BIA or BLM. On appeal, Degnan included affidavits made by herself, her mother, and her brother. These documents describe the circumstances surrounding the filing of her application.

Degnan checked on her application after hearing about others' problems with their allotment applications, and discovered that there was no record of her application. On August 27, 1984, Degnan's reconstructed Native allotment application was filed with BLM. After reviewing the application, and the accompanying affidavits, BLM issued its decision rejecting Degnan's application.

In the answer, BLM states that it does not dispute that an allotment was staked and an application prepared. BLM states that it can be taken as undisputed that appellant gave a completed form to her father to mail and, while her father is now deceased, it can be presumed that he did mail the application even though specific facts concerning the mailing are unknown. Further, for the purposes of this appeal, BLM does not dispute that all of the activities took place prior to December 18, 1971.

BLM states, however, that there does not presently exist either an original or a copy of an allotment application for Degnan which was received by an agency of the Department by December 18, 1971; that there is no docu-mentary evidence supporting receipt of such an application on or before December 18, 1971; and BIA has not certified that a timely application was received.

Both parties acknowledge that the Alaska Native Allotment Act of 1906, as amended, 43 U.S.C. || 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of land to individual Native Alaskans and that the Act was repealed by section 18(a) of ANCSA, 43 U.S.C. | 1617 (1976). Section 18(a) of ANCSA, 43 U.S.C. | 1617(a) (1982), however, provided for the further processing of any allotment application which was "pending before the Department of the Interior on December 18, 1971."

Degnan contends that where questions arise concerning the timely filing of an application before December 18, 1971, an applicant has a right to a hearing under Pence v. Morton, 391 F. Supp. 1021 (D. Alaska 1975).

BLM contends that the allotment application for Degnan was not received by any Interior agency by December 18, 1971, and therefore a reconstructed application cannot be considered at this time. BLM further states that Degnan's attempted "reconstructed application" dated December 29, 1983, was unsatisfactory due to the lack of tangible, objective, documentary evidence.

In support of their decision finding Degnan's "reconstructed application" to be unsatisfactory BLM states as follows:

> Use of such criteria in considering reconstructed allotment applications was advised in a legal opinion of October 1, 1985 from the Office of the Regional Solicitor, Alaska Region (contained in the administrative record), and is dictated by the October 18, 1978 instructions of Assistant Secretary Horton. The full text of the pertinent portion of the Horton memo is as follows:
>
> > Pending Before the Department on December 18, 1971
> >
> > This phrase is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Depart- ment of the Interior on or before December 18, 1971. The Department has no authority to consider any appli- cation not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.
> >
> > The legal opinion from the Office of the Regional Solicitor similarly advised that in order to reconstruct an application, there must be, ". . . sufficient objective, documentary proof which must include a federal agency document showing timely receipt; allegations of

> timely filing without such proof are not sufficient." See, Decision, at 1, and Opinion of October 1, 1985 (contained in the administrative record). [Emphasis in original.]

As regards appellant's December 29, 1983, "reconstructed application" BLM notes that there was no document or verification from any Federal agency; no date or time-stamped document indicating timely receipt; and no affidavit attesting to timely filing executed by a Federal official. In short, BLM states that no acknowledgement of receipt or any other document indicating receipt of an application for Degnan by December 18, 1971, has been located.

Of the three affidavits describing the circumstances surrounding the filing of Degnan's original Native allotment application, two, Degnan's and her mother's, were also sent with the "reconstructed application."

June Degnan's affidavit states as follows:

> 8. In late 1969, as the Native Claim Act began to take shape, [Degnan's father's] urgings became more emphatic and I decided to apply for [my Native allotment].
>
> 9. My father and I drove out to my favorite blueberry pick-ing and picnic[k]ing area outside of town and we staked it out by using 2x4's sprayed with orange fluorescent paint with my name marked on them. These stakes are still there today.
>
> 10. Then I filled out a Native Allotment application form and signed it.
>
> 11. I gave this to my father to mail to the BIA or BLM but I was busy with other things and never worried about it.

Degnan's mother's affidavit states as follows:

> 6. Then they filled out their applications and my husband mailed them to either the BLM or the BIA in Anchorage. I'm not sure which one.
>
> 7. June staked her land with her father's help and had her own application just like everyone else.
>
> 8. The rest of us got our allotments and I don't know any reason why she didn't get hers'.

In the third affidavit, submitted with the statements of reasons, Degnan's brother states as follows:

> During the summer of 1967, when my sister June and our father, Frank Degnan staked and applied for June's native allotment, I was an officer in the U.S. Army - military police stationed in Berlin, Germany. When I returned to our home in Unalakleet from that tour of duty, November 1968, our father

> informed me that all of our land applications for native allot-ments were completed. He stated that the final application, being June's had been staked and applied for. He was happy to give me that message. Since it was he that initiated all other native allotments in this village, he was well aware of the complete procedure, that being an actual staking and the filing of the completed applications via the mail to the BIA office. All during our discussions from that time on, he was steadfast in his understanding that all of this family's native allotments had been staked and applied for. Knowing the thoroughness of our father, when he said the job was completed, it was so in my mind. I am assured that June's native allotment completed the process, just as the applications for all other members of the Degnan Family have. I have no reason to doubt our father's or my sister June's word. They both know that land is secured and so do I.

[1] Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), in conjunction with Pence v. Andrus, 586 F.2d 733, 743 (9th Cir. 1978), stands for the proposition that due process considerations in the case of an Alaskan Native require an oral hearing prior to Departmental rejection of a Native allot-ment application if there is a material issue of fact regarding the validity of the application. See also United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). In Pence, the factual question involved whether the applicant had complied with the use and occupancy requirements of section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. | 270-3 (1970). However, the requirement of a hearing has also been applied by the Board to the question of whether an application was voluntarily and knowingly relinquished (Feodoria (Kallander) Pennington, 97 IBLA 350, 354-55 (1987)) and whether a Native allotment application was pending before the Department on December 18, 1971 (Stephen Northway, 96 IBLA 301, 308 (1987)).

In Heirs of Linda Anelon, 101 IBLA 333, 337 (1988), we addressed the issue as to whether sufficient proof that a Native allotment application was pending before the Department on December 18, 1971, "must include a Federal agency document showing timely receipt." In Heirs of Linda Anelon, supra at 337, we stated:

> That conclusion was apparently derived from Assistant Secretary Horton's October 18, 1973, memorandum. However, that memorandum stated that evidence of pendency "shall be satisfied" by a Departmental time stamp or the affidavit of a Departmental official attesting to receipt on or before December 18, 1971. We do not believe the memorandum precluded reliance on other evidence. Nevertheless, we wish to emphasize that affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. See Wilson v. Hodel, 758 F.2d 1369, 1374 (10th Cir. 1985); John R. Wellborn, 87 IBLA 20 (1985); H. S. Rademacher, 58 IBLA 152, 156, 88 I.D. 873, 876 (1981). Such collaborating evidence is absent from the present record.

Nevertheless, we set aside the BLM decision and referred the case for hearing.

We consider The Heirs of Linda Anelon, supra, to be controlling herein. The affidavits of appellant, her mother, and brother state that Degnan's application was completed, signed and given to her father, who mailed it to the Department prior to December 18, 1971. These affidavits are sufficient to raise a factual question as to whether appellants' application was timely filed. This is because, accepting the truth of the affidavits, as we must do in determining whether there is a question of fact (Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976)), the affidavits state affirmatively that the application was mailed to the Department by appellant's father prior to December 18, 1971. 1/ On the other hand, BLM's position is supported by the presumption, which stems from the absence of appellant's original application from the record, that the application was not filed timely. E.g., David A. Gitlitz, 95 IBLA 221, 224 (1987). In such situation, there clearly is a factual question whether Degnan's application was timely filed.

Accordingly, we will set aside the May 1986 BLM decision and refer the case to the Hearings Division, Office of Hearings and Appeals, for the assignment of an Administrative Law Judge, pursuant to 43 CFR 4.415. The Judge will hold a hearing on the question of whether June I. Degnan had a Native allotment application pending before the Department on December 18, 1971. Appellant will have the burden of establishing that her application was timely received. Following the hearing, the Administrative Law Judge will issue a decision, which will be appealable to the Board pursuant to 43 CFR 4.410. In the absence of an appeal, the decision of the Adminis-trative Law Judge will be final for the Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision is set aside and the case is referred to the Hearings Division for a hearing.

Gail M. Frazier
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

1/ There is a presumption that mail properly addressed and with adequate postage affixed and deposited in an appropriate receptacle is duly delivered.